No. 96-204

Supreme Court, U.S.
FILED
SEP 6 1996
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1995

SYDNEY KOVEN, BARBARA KOVEN (also known as BARBARA A. WOOD), GARRET GALLERY, INC., a California corporation,

*Petitioners,*

*vs.*

PACIFIC-MAJOR CONSTRUCTION CO., INC., a California corporation, DEBORAH S. GOLDS, RUTH LEWIS, BERT A. NOTCH and ROLAND ROJAS,

*Respondents.*

*On Petition for Writ of Certiorari to the Supreme Court of the State of California*

## BRIEF IN OPPOSITION FOR RESPONDENTS DEBORAH S. GOLDS, BERT A. NOTCH AND ROLAND ROJAS

BRIAN P. KEIGHRON
*Counsel of Record*
LAW OFFICES OF
ALAN E. WISOTSKY
*Attorneys for Respondents Deborah S. Golds, Bert A. Notch and Roland Rojas*
1000 Town Center Drive
Suite 200
Oxnard, California 93030
(805) 278-0920

## QUESTION PRESENTED

Whether this Court should grant certiorari in a case arising out of a home remodeling contract when the alleged constitutional issues were not raised by petitioners in the state Court of Appeal nor addressed or ruled upon by the state courts below.

## LIST OF INTERESTED PARTIES

The petitioners are Sydney Koven, Barbara Koven (also known as Barbara A. Wood), and Garret Gallery, a California corporation. Petitioners are represented by Lee W. Landrum.

Respondents filing this Brief in Opposition are Deborah S. Golds, Bert A. Notch, and Roland Rojas. These respondents are represented by Brian P. Keighron, Law Offices of Alan E. Wisotsky.

Respondent Ruth Lewis is represented by Marquie Spiszman.

Respondent Pacific-Major Construction Co., Inc., is a bankrupt corporation, did not file a responsive pleading in the state court, and is unrepresented by counsel.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| List of Interested Parties | ii |
| Table of Contents | iii |
| Table of Citations | iv |
| Introduction | 1 |
| Statement of Jurisdiction | 1 |
| Statement of the Case | 1 |
| A. Course of Proceedings and Disposition of the Case Below | 1 |
| B. Correction of Misstatements in the Petition | 3 |
| Reasons for Denying the Writ | 4 |
| I. This Court should refuse to consider petitioners' arguments or questions. | 4 |
| II. In any event, petitioners had ample opportunity to prove their case. | 6 |
| Conclusion | 7 |

*Contents*

*Page*

## TABLE OF CITATIONS

**Cases Cited:**

*People v. Triggs*, 8 Cal. 3d 884 (1973) ..... 5

*Yee v. City of Escondido*, 503 U.S. 519 (1992) ..... 4, 5

**Statutes Cited:**

28 U.S.C. § 1257 ..... 4

28 U.S.C. § 1257(a) ..... 1

California Codes of Civil Procedure:

§ 1281.2 ..... 5

§ 1286.2 ..... 5

§ 1286.2(c)(d) ..... 4, 5

§ 1286.6 ..... 5

**United States Constitution Cited:**

Fifth Amendment ..... 4, 5

**Rules Cited:**

Supreme Court Rule 10 ..... 5

Supreme Court Rule 15.1 ..... 3

## INTRODUCTION

This case arises out of an alleged breach of a home remodeling contract. The contract contained an arbitration clause. The case went to binding arbitration. Simply put, petitioners were dissatisfied with the result of the arbitration.

The arbitration award was confirmed by the Ventura County Superior Court, State of California. The petitioners filed an appeal in the Court of Appeal of the State of California. The appellate court confirmed the judgment. Petitioners filed a Petition for Review with the California Supreme Court. The writ was denied. Petitioners have now filed a meritless Petition for Writ of Certiorari with this Court. Petitioners' actions should not be condoned, and their Petition should be summarily denied by this Court.

## STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The alleged constitutional questions set forth in the Petition were not raised by petitioners in the state Court of Appeal nor addressed by the state courts below and thus should not be considered by this Court.

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition of the Case Below

The petitioners filed a Complaint in the Ventura County Superior Court arising out of an alleged breach of a home remodeling contract. The contract contained an arbitration clause. Respondents petitioned the court to compel arbitration based on the contractual provision. The petitioners were ordered to proceed to arbitration. Interestingly, petitioners' counsel

states that he "refused" to file an application for arbitration (Petition at 10). Such refusal would have been an apparent violation of the court order. The individual defendant respondents ultimately filed the application for the arbitration with the American Arbitration Association.

The arbitrator concluded, after a six-day arbitration, that:

1. There was no breach of the contract;

2. There was no evidence to support the fraud and conspiracy claims;

3. There was no evidence to support the negligence and intentional infliction of emotional distress claims;

4. There was no basis for or evidence in support of the alter ego claims;

5. Respondents Deborah S. Golds, Roland Rojas, and Ruth Lewis were entitled to attorney's fees and costs.

There was no responsive pleading filed on behalf of the corporation in the superior court action, nor was evidence presented at the arbitration on behalf of the corporation. The arbitrator determined that the petitioners were entitled to a "refund" of $18,748.45 from the corporation based on the legal theory of "money had and received" since the petitioners had paid more money than the construction work they had received at the time of the termination of the contract.

The respondents filed a Petition to Confirm Arbitration Award. The superior court confirmed the arbitration award and denied the petitioners' application for vacation of the award. The petitioners then filed a Notice of Appeal from the judgment,

except from that part of the judgment which was in their favor and against Pacific-Major Construction Co.

The Court of Appeal affirmed the judgment. Petitioners then filed a Petition for Review to the California Supreme Court. The Petition for Review was denied on May 15, 1996. The petitioners then filed their Petition for Writ of Certiorari in this Court.

**B. Correction of Misstatements in the Petition**

The Petition contains numerous misstatements. Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of fact contained in the Petition to the Court's attention.

Petitioners misrepresent that Pacific-Major Construction Co., Inc., was represented by counsel during the entire proceedings which took place in the superior court prior to that court's order compelling binding arbitration (Petition at v). In fact, no responsive pleading was ever filed on behalf of the corporation in the superior court proceeding.

Petitioners misrepresent to the Court that a motion for summary judgment had been denied to the respondents (Petition at 9). In fact, respondents had filed a motion for summary adjudication as to the statute of limitations for one cause of action, not a motion for summary judgment.

The Petition misrepresents that the arbitrator and court accepted and included evidence that had been submitted by the corporation (Petition at 10). In fact, the evidence at the arbitration was presented on behalf of the individual defendants and not the corporation.

The petitioners' comments regarding the arbitrator's alleged prejudice, misconduct, and bias scattered throughout the Petition are merely *ad hominem* attacks with no basis in fact.

Petitioners misstate a quote from the California Court of Appeal decision on page 12 of the Petition. The petitioners' quote from the Court of Appeal decision is that "Pacific-Major stopped work before completion *and* Kovens recorded a 'Notice of Cessation' of work." The actual quote at page 2 of the Court of Appeal decision is that "Pacific-Major stopped work before the project was completed *because* Sydney Koven recorded a 'Notice of Cessation.' " (Emphasis added to quotes.)

## REASONS FOR DENYING THE WRIT

### I.

### THIS COURT SHOULD REFUSE TO CONSIDER PETITIONERS' ARGUMENTS OR QUESTIONS.

In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the United States Supreme Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992).

The petitioners did not raise any constitutional issues in their Opposition to Respondents' Motion to Compel Arbitration. Petitioners did not raise the issues of the constitutionality of the California Code of Civil Procedure sections regarding arbitration or a violation of procedural due process of the Fifth Amendment to the United States Constitution in their appeal. It was not until their Petition for Review in the California Supreme Court that the petitioners made any issue of the unconstitutionality of California Code of Civil Procedure

§ 1286.2(c)(d). The California Supreme Court denied review. Such a denial expresses no view as to the merits of the claim, and thus the issue was not addressed by that court. *See People v. Triggs*, 8 Cal. 3d 884, 890-891 (1973). *Yee, supra*, at 533.

Respondents will briefly review the "Questions Presented" by petitioners. As to Question No. 1, the petitioners never raised an issue in the superior court or state Court of Appeal as to the scope or limitations of appellate jurisdiction or the Legislature's power to regulate appellate review. As to Question Nos. 2 and 3, petitioners never raised the question of whether Code of Civil Procedure §§ 1281.2, 1286.2, or 1286.6 were unconstitutional in the superior court or state Court of Appeal. As to Question No. 4, the petitioners never raised the issue that the court order compelling arbitration was unconstitutional. As to Question No. 5, the petitioners did not raise an issue as to a violation of the Fifth Amendment to the United States Constitution in the Court of Appeal. In any case, none of the "constitutional questions" were addressed or ruled upon by the state courts.

The United States Supreme Court generally considers the following factors in deciding whether to grant certiorari when dealing with state court decisions: (a) where the state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or a United States Court of Appeals; or (b) a state court has decided an important question of federal law that has not been settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. *See* Rules of the Supreme Court, Rule 10. Clearly, the judgment in this case does not satisfy these standards.

In short, the petitioners did not raise any constitutional issues or questions in the state Court of Appeal, and no state court addressed such a claim. Therefore, this Court should not consider such issues or claims in this case. *Yee* at 533.

## II.

## IN ANY EVENT, PETITIONERS HAD AMPLE OPPORTUNITY TO PROVE THEIR CASE.

The arbitration provision of the contract states that "Any controversy or claim arising out of or related to the contract, or the breach thereof, shall be settled by arbitration . . . ." The parties thereby contractually agreed that the arbitrator would decide all controversies or disputes. The petitioners did not request the courts below to review the validity, enforceability, or construction of the arbitration provision of the contract.

The petitioners had approximately four years of litigation and a six-day arbitration to prove their case. They had ample opportunity to present evidence and subpoena witnesses and to rebut the respondents' contentions. The petitioners' claim that they were deprived of any rights to defend the action is without merit.

There is no basis for the petitioners' claim that they were denied "due process."

## CONCLUSION

The Petition for Writ of Certiorari is without merit and should be denied.

Dated: September 5, 1996

Respectfully submitted,

BRIAN P. KEIGHRON
*Counsel of Record*
LAW OFFICES OF ALAN E. WISOTSKY
*Attorneys for Respondents Deborah S. Golds, Bert A. Notch and Roland Rojas*
1000 Town Center Drive, Suite 200
Oxnard, California 93030
(805) 278-0920